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Attorney for defendant David Reid

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

CR-05-1849 JH

vs.

DAVID REID,

Defendant.

MOTION FOR EVIDENTIARY HEARING AND TO SUPPRESS IN-COURT
IDENTIFICATION OF DAVID REID BY INFORMANT "CW5"

Excludable delay under 18 U.S.C. §3161(h)(1)(F) will occur as a
result of this motion or of an order based thereon.

The defendant David Reid, by his counsel undersigned, pursuant to
the Fifth Amendment to the Constitution, moves this Court for an order

1 setting an evidentiary hearing and, at the conclusion of that hearing,
2 precluding the prosecution from presenting evidence that informant "CW5"
3 previously identified Mr. Reid or from identifying Mr. Reid during trial. This
4 motion is based on the accompanying Memorandum of Points and
5 Authorities, as well as the attached Exhibit.
6

7 RESPECTFULLY SUBMITTED this 2nd day of February, 2009.
8

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12 BY /S/ Walter Nash
13 WALTER NASH
14 Attorney for Defendant Reid
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MEMORANDUM OF POINTS AND AUTHORITIES

I. Overview

The prosecution has disclosed reports of two interviews with informant "CW5", who will testify pursuant to a plea agreement. The informant claimed to have met Mr. Reid on one occasion by the side of a highway a year before the first interview and fifteen months before the second. The informant did not describe Mr. Reid and gave materially different descriptions of their meeting in the two interviews. Agents showed CW5 a single photograph of Mr. Reid, as well as single photographs of others allegedly involved in the marijuana enterprise. The informant told the agents that Mr. Reid's photograph "look[ed] familiar."

For more than forty years, courts have held that the Due Process Clause precludes unreliable witness identification evidence of an accused. Any evidence from CW5 identifying Mr. Reid, including any in-court identification, would be based on impermissibly suggestive procedures and would be unreliable. Such evidence must be precluded.

II. Factual Background

"CW5" is a convicted felon with whom the prosecution struck a plea agreement in exchange for testimony. The prosecution has disclosed two

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1 reports summarizing interviews of CW5. In the first, conducted on
2 December 27, 2005, the informant described his history of drug dealing
3 that began more than forty years ago. (Drug Enforcement Administration
4 Report of Investigation, dated 1/14/05, attached as Exhibit "A", at 1-11).
5

6 The report's only reference to David Reid is that CW5:

7 [S]aid that he met Dave REID the pilot for the
8 JARVIS DTO one time off Interstate 10 near Avre
9 (*sic*) Valley, Arizona at the request of JARVIS.
10 CW5 said that REID pulled up to meet CW5 with his
11 whole family in the car and handed CW5
12 \$50,000.00 to \$80,000.00 in bulk U.S. Currency in
13 a small duffel bag. CW5 said it was obvious what
14 was in the bag and REID made no attempt to
15 disguise the bulk cash transfer. CW5 thought he
16 met Reid another time socially.

17 (*Id.* at 9). The informant did not describe Mr. Reid. CW5 was apparently
18 shown single photographs of nineteen men and women - many of whom
19 the informant knows well - who were allegedly involved in the charged
20 enterprise. (*Id.* at 10-11). The informant said that Mr. Reid's photograph
21 "looks familiar." (*Id.* at 11).

22 The second interview was conducted three months later, on March
23 26, 2006, in the presence of the informant's attorney. (Internal Revenue
24 Service Memorandum, dated 4/11/06, Exhibit "A" at 12-14). In this version
25 of the alleged meeting with David Reid, CW5 substantially altered the
26

1 amount of money and the container. The report summarizes:

2 [The informant] stated that on or about December
3 26,2004, he met Reid on the side of the highway
4 near a cement plant and airport on Avra Valley
5 Road. [CW5] further stated that Reid arrived driving
6 a vehicle with his daughter and his grandchildren
7 carrying \$15,000 in a paper bag from JARVIS.

8 (*Id.* at 13). The informant apparently did not describe Mr. Reid and was
9 shown no photographs during the second interview.

10 III. Legal Analysis

11 Beginning with *Stovall v. Denno*, 388 U.S. 293 (1967), the Supreme
12 Court decided a series of cases establishing protections against unreliable
13 witness identifications under the Due Process Clause. In *Manson v.*
14 *Brathwaite*, 432 U.S. 98, 111-112 (1977), the Court explained:

15 The driving force behind *United States v. Wade*,
16 388 U.S. 218 (1967), *Gilbert v. California*, 388 U.S.
17 263 (1967)(right to counsel at a post-indictment
18 line-up), and *Stovall*, all decided on the same day,
19 was the Court's concern with the problems of
20 eyewitness identification. Usually, the witness must
21 testify about an encounter with a total stranger
22 under circumstances of emergency or emotional
23 stress. The witness' recollection of the stranger can
24 be distorted easily by the circumstances or by later
25 actions of the police. Thus, *Wade* and its
26 companion cases reflect the concern that the jury
not hear eyewitness testimony unless that
testimony has aspects of reliability.

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1 Research and experience have revealed further dangers of erroneous
2 eyewitness identification. See, e.g., Wells, et. al, "Eyewitness Evidence:
3 Improving Its Probative Value", 7 Psychological Science in the Public
4 Interest 45-75 (2006). These dangers are enhanced where, as here, the
5 challenged identification is made by an admitted drug dealer and previously
6 convicted felon who is seeking favor from the prosecution.
7

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9 The Tenth Circuit holds, "When the constitutionality of a photo array
10 is challenged, the due process clause requires a two-pronged inquiry: first,
11 the court must determine whether the photo array was impermissibly
12 suggestive, and if it is found to be so, then the court must decide whether
13 the identifications were nevertheless reliable in view of the totality of the
14 circumstances." *United States v. Sanchez*, 24 F.3d 1259, 1261-1262 (10th
15 Cir. 1994). *In accord United States v. Wiseman*, 172 F.3d 1196, 1208
16 (10th Cir. 1999). CW5's identification of Mr. Reid's photograph fails both
17 prongs of this standard.
18

19
20 A. The Photo Array was Impermissibly Suggestive

21 In deciding whether a photo array is unduly suggestive, "Courts use a
22 number of factors . . . , including the size of the array, the manner of its
23 presentation by the officers, and the details of the photographs
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1 themselves." *United States v. Sanchez*, 24 F.3d at 1262. Based on the
2 only information available, the agent's report of the first CW5 interview, it
3 appears that the informant was merely shown photographs of nineteen
4 suspects, including men and women of widely different ages and
5 ethnicities. (Exhibit "A" at 10-11). The agents neglected to show the
6 informant photographs of other people who bear resemblance to Mr. Reid.
7 Further, the informant was shown only photographs of people agents
8 believed to be part of the alleged marijuana enterprise, many of whom
9 CW5 had long known.

12 The impact of the agents' presentation was to advise the informant
13 that every photograph was an offender. Further, the agents did not show
14 the informant any photographs - other than the one of David Reid - similar
15 to Mr. Reid. The impact was therefore no different than a "show up" of a
16 single photograph with the clear message that the informant should identify
17 the person portrayed.
18

19 In both *Sanchez*¹ and *Wiseman*², witnesses were shown six
20 photographs, including the suspect's, of people who resembled each other.
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24 ¹24 F.3d at 1261.

25 ²172 F.3d at 1208.
26

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1 The *Sanchez* Court noted that such a small number calls the suggestibility
2 of the array into question, stating, "[C]ourts have held that a photo array
3 with as few as six pictures is not per se unconstitutional." (citations
4 omitted). 24 F.3d at 1262. The Court further recognized, "The lower the
5 number of photographs used by officers in a photo array, the closer the
6 array must be scrutinized for suggestive irregularities." *Id.* at 1263.
7
8 Similarly, the *Wiseman* Court referred to six photographs as a "low
9 number". 172 F.3d at 1209.

11 In *Wiseman*, the five photographs presented with the suspect's were
12 selected due to similarity in "several characteristics, such as shape of the
13 face, age, height, race and hair color." *Id.* at 1208. Regardless, the Court
14 found the array to be impermissibly suggestive because Wiseman's
15 photograph "stands out from the others" due to dark circles under his eyes
16 and the unnatural pallor of his skin tone. *Id.* at 1209. The Court's finding
17 was buoyed by the fact that officers told some witnesses that a suspect
18 had been arrested, a message held to be "highly suggestive." *Id.* See also
19 *Grubbs v. Hannigan*, 982 F.2d 1483, 1490 (10th Cir. 1993).

22 The suggestiveness of the presentation to CW5 was substantially
23 greater than was presented by the facts in *Wiseman*. Here, the informant
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1 was not shown any photographs - other than David Reid's - resembling the
2 accused. Further, the informant was shown only photographs of suspects,
3 many of whom he knew from his decades of drug dealing with Dana Jarvis
4 and his associates. The agents sent a clear message to CW5 - who has a
5 strong incentive to please the Government - that he should recognize each
6 photograph put before him. It is therefore respectfully submitted that the
7 Court must find that the presentation was unduly suggestive.
8
9

10 B. The Informant's Tentative Out-of-Court Identification and Any
11 In-Court Identification are Unreliable

12 The Court must next consider "whether the identification[] by the
13 witness[] [was] reliable in spite of the 'corrupting influence' of the
14 suggestive circumstances." *United States v. Wiseman*, 172 F.3d at 1210.
15 This analysis must begin with the critical fact that the informant did not
16 identify David Reid, but simply stated that his photograph "looks familiar."
17 (Exhibit "A" at 10). Any in-court identification would be nothing more than a
18 "show-up" in which it would be obvious to the informant that David Reid
19 was the individual whose picture had previously been shown to CW5 and
20 who was seated next to counsel undersigned.
21
22

23 Five elements are to be considered in determining whether a witness
24 identification is reliable:
25
26

1 [T]he factors to be considered in evaluating the
2 likelihood of misidentification include the opportunity
3 of the witness to view the criminal at the time of the
4 crime, the witness' degree of attention, the accuracy
5 of the witness' prior description of the criminal, the
6 level of certainty demonstrated by the witness at the
7 confrontation, and the length of time between the
8 crime and the confrontation.

9 *United States v. Wiseman*, 172 F.3d at 1210, *quoting Neil v. Biggers*, 409
10 U.S. 188, 199-200 (1972). These factors demonstrate the unreliability of
11 any identification of Mr. Reid by CW5.

12 The first two factors - the informant's opportunity to view the person
13 on the side of the highway and the informant's degree of attention - cannot
14 be analyzed in detail without an evidentiary hearing due to the paucity of
15 information disclosed by the prosecution regarding the informant's alleged
16 meeting with Mr. Reid. It appears, however, that the alleged meeting was
17 quite brief in light of the fact that CW5 stated that the men met on the side
18 of the road to exchange a bag.

19 The remaining factors strongly call for a finding that any previous or
20 in-court identification are unreliable. The third factor - accuracy of the
21 witness's prior description - cannot support a finding of reliability because
22 the agents never asked the informant to describe the person he met on the
23 side of the road. In addition, the informant's brief descriptions of the
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1 meeting are materially inconsistent. In the first interview, CW5 said that he
2 received between \$50,000 and \$80,000; in the second, he said that he
3 received \$15,000. In the first, the informant said the money was in a duffel
4 bag; in the second, he said the money was in a paper bag.
5

6 The fourth factor - the level of certainty in the informant's
7 identification - provides conclusive evidence that any identification will be
8 unreliable. The informant did not identify Mr. Reid's photograph as the
9 person he met on the side of the road. The informant only said that he
10 thought Mr. Reid's photograph "look[ed] familiar." *Compare Grubbs v.*
11 *Hannigan*, 982 F.2d at 1490 (when shown photo array, witness
12 "immediately identified" defendant).
13
14

15 Finally, according to the second interview³, CW5 said that the
16 meeting occurred the day after Christmas, 2004. A year passed between
17 the alleged meeting and the first interview, while fifteen months passed
18 between the meeting and the second interview. Any in-court identification
19 will take place more than four years after the meeting. These time gaps
20 render the reliability of any identification highly unreliable. *Compare United*
21 *States v. Wiseman*, 172 F.3d at 1211 (three months "not an extremely long
22
23

24 _____
25 ³No date is provided in the report of the first interview.
26

1 time . . .").

2 The informant's tentative statement that Mr. Reid's photograph
3 looked familiar precludes any evidence of the alleged December 2004,
4 meeting. Further, the prosecution must be precluded from using an in-
5 court "show-up" to elicit CW5's identification of Mr. Reid during trial. Due
6 process requires nothing less.
7

8
9 III. Conclusion

10 For the reasons set forth above, it is respectfully submitted that the
11 Court conduct an evidentiary hearing to determine whether evidence of
12 CW5's out-of-court or in-court identification of David Reid comports with the
13 standards of due process. It is further submitted that, at the conclusion of
14 the hearing, the Court preclude any such testimony.
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16 RESPECTFULLY SUBMITTED this 2nd day of February, 2009.
17

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was delivered to opposing counsel and all other counsel of record *via* the CM/ECF system this 2nd day of February, 2009.

/s/ Walter Nash
Walter Nash

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